Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-1127

* * *

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

* * *

BRIEF FOR THE PETITIONER

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INDEX

Page

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 15

ARGUMENT AND AUTHORITIES:

I. THERE WAS NO DUE PROCESS VIOLATION IN THE PRESENTATION OF THE PSYCHIATRIC TESTIMONY 19

A. Due Process was not violated by the Manner in Which the Testimony was Presented 19

B. Due Process was not violated by the Nature of the Psychiatric Testimony 24

C. The Error, if any, in the Admission of the Psychiatric Testimony, was Waived by Counsel's Failure to Object on the Specific Grounds of Surprise or Denial of Confrontation and Cross-Examination 30

II. THERE WAS NO VIOLATION OF RESPONDENT SMITH'S FIFTH AND SIXTH AMENDMENT RIGHTS IN THE TESTIMONY EVALUATING HIS MENTAL STATUS 32

A. The Evidentiary Limitations of Miranda V. Arizona, 384 U.S. 436 (1966) are Inapplicable to the Presentation of Testimony for Determination of Punishment 32

B. The Psychiatric Examination was not a Custodial Interrogation Within the Meaning of Miranda v. Arizona, 384 U.S. 436 (1966) 35

C. The Fifth Amendment Privilege Against Self-Incrimination is not Self-Executing 37

III. THE FEDERAL DISTRICT COURT ERRED IN GRANTING THE WRIT OF HABEAS CORPUS WITHOUT REQUIRING PROOF FROM THE HABEAS PETITIONER 38

CONCLUSION 40

TABLE OF AUTHORITIES

Cases **Page**

Alsup v. State, 210 S.W. 195 (Tex.Crim.APP. 1919) 31

Alvord v. State, 322 So.2d 533 (1975) 26

Beckwith v. United States, 425 U.S. 341 (1976) 35

Bell v. Ohio, 438 U.S. 637 (1978) 25

Boulware v. State, 442 S.W.2d 677 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 959 (1977) 17, 30, 37

Brady v. Maryland, 373 U.S. 83 (1963) 22

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 26

Chambers v. Florida, 309 U.S. 227 (1940) 35

Chambers v. Mississippi, 410 U.S. 284 (1973) 19

Crawford v. State, 305 S.W.2d 362 (Tex.Crim.App. 1957) 31

Crestfield v. State, 471 S.W.2d 50 (Tex.Crim.App. 1971), *cert. denied*, 406 U.S. 917 (1972) 37

Fare v. Michael C., 442 U.S. 707 (1979) 34

Fay v. Noia, 372 U.S. 391 (1963) 38

Garcia v. State, 581 S.W.2d 168 (Tex.Crim.App. 1977), *cert. denied*, 441 U.S. 967 (1979) 34

Gardner v. Florida, 430 U.S. 349 (1977) 15, 19, 20, 21, 26

Garner v. United States, 424 U.S. 648 (1976) 33, 36, 37

Gibson v. State, 516 S.W.2d 406 (Tex.Crim.App. 1974 38

Gregg v. Georgia, 428 U.S. 153 (1976) 24, 29, 33

Griffith v. State, 391 S.W.2d 428 (Tex.Crim.App. 1965) 30

Harris v. State, 465 S.W. 2d 175 (Tex.Crim.App. 1971) 38

Hays v. State, 36 S.W.2d 1029 (Tex.Crim.App. 1931) 17, 31

Henry v. Mississippi, 379 U.S. 443 (1965) 23, 32

Hovila v. State, 532 S.W.2d 293 (Tex.Crim.App. 1975) 23

Jones v. State, 501 S.W.2d 677 (Tex.Crim.App. 1973) 31

Jurek v. Texas, 428 U.S. 262 (1976) 24, 33, 34

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Lockett v. Ohio, 438 U.S. 586 (1978) 25

Mason v. Commonwealth, 254 S.E.2d 116 (Va. 1979) 26

Michigan v. Tucker, 417 U.S. 433 (1974) 35

Miranda v. Arizona, 384 U.S. 436 (1966) 5,17,18,32,33 34,35,36,37

Mutscher v. State, 514 S.W.2d 905 (Tex.Crim.App. 1974) 30

Norman v. State, 323 S.W.2d 669 (Tex.Crim.App. 1975) 31

Novak v. State, 384 S.W.2d 140 (Tex.Crim.App. 1964) 31

In Re Oliver, 333 U.S. 257 (1948) 19

Presnell v. State, 243 S.E.2d 496 (Ga.) *rev'd & remanded* 439 U.S. 14 (1978) 26

Proffitt v. Florida, 428 U.S. 242 (1976) 25

Riggs v. United States, 280 F.2d 750 (5th Cir. 1960) 24

Roberts v. United States, 48 U.S.L.W. 4370 (U.S. Apr. 15, 1980) (No. 78-1793) 33,34,35,37,38

Robinson v. State, 548 S.W.2d 63 (Tex.Crim.App. 1977) 25

Schmerber v. California, 384 U.S. 757 (1966) 36, 37

Shippy v. State, 556 S.W.2d 246 (Tex.Crim.App.) *cert. denied*, 434 U.S. 935 (1977) 34

Shumake v. State, 502 S.W.2d 758 (Tex.Crim.App. 1973) 38

Smith v. Commonwealth, 248 S.E.2d 135 (Va. 1978) 26

Smith v. Estelle, 445 F.Supp. 647 (N.D.Tex. 1977) 23

Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) 15, 26

Smith v. State, 540 S.W.2d 693 (Tex.Crim.App. 1976) 11

Smith v. Texas, 430 U.S. 922 (1977) 12

Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.), *cert. denied*, 440 U.S. 976 (1978) 24

Taylor v. State, 489 S.W.2d 890 (Tex.Crim.App. 1973) 38

Thornton v. Corcoran, 407 F.2d 695, 700 (D.C. Cir. 1969) 36

Townsend v. Sain, 372 U.S. 293 (1973) 38, 39

United States v. Albright, 388 F.2d 719 (7th Cir. 1968) 36

United States v. Baird, 414 F.2d 700 (2nd Cir. 1969) 36

United States v. Cohen, 530 F.2d 43 (5th Cir. 1976) 36

United States v. Dionisio, 410 U.S. 1 (1973) 37

United States v. Grayson, 438 U.S. 41 (1978) 26, 33

United States v. Kordel, 397 U.S. 1 (1970) 37

United States v. Mandujano, 425 U.S. 564 (1976) 37

United States v. Tucker, 404 U.S. 443 (1972) 26, 33

United States v. Wade, 488 U.S. 218 (1967) 37

Villareal v. State, 214 S.W.2d 464 (Tex.Crim.App. 1948) 30

Von Byrd v. State, 569 S.W.2d 883 (Tex.Crim.App. 1978) 34

Wainwright v. Sykes, 433 U.S. 72 (1977) 32, 38

Weatherford v. Bursey, 429 U.S. 545 (1977) 22

Williams v. New York, 337 U.S. 241 (1949) 15, 19, 20 21, 26, 33

Witt v. State, 342 So.2d 497 (Fla. 1977) 26

Woodson v. North Carolina, 428 U.S. 280 (1976) 16,24,33

Zillender v. State, 557 S.W.2d 515 (Tex.Crim.App. 1977) 30

STATUTES

Cases **Page**

28 U.S.C. §1254(1) 2

28 U.S.C. §2254 ..... 19, 38

Fed. Rules Crim. Proc. Ann. rule 23 (West) 33

Tex. Code Crim. Proc. Ann. art. 1.14 (Vernon) 30, 38

Tex. Code Crim. Proc. Ann. art. 15.17 (Vernon) 5

Tex. Code Crim. Proc. Ann. art. 29.13 (Vernon) 17, 31

Tex. Code Crim. Proc. Ann. art. 37.071(a),(b)(2) (Vernon) 2, 3, 4, 24

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR THE PETITIONER

* * *

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 602 F.2d 694 and is reproduced as appendix A to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Criminal Appeals for the Fifth Circuit was entered on September 13, 1979. Rehearing and rehearing en banc were denied on October 22, 1979. The Petition for Writ of Certiorari

was filed within ninety days after that final judgment denying rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Certiorari was granted on March 17, 1980.

QUESTIONS PRESENTED

I. WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BY THE USE OF PSYCHIATRIC TESTIMONY AT THE PUNISHMENT TRIAL ON THE ISSUE OF FUTURE DANGEROUSNESS.

II. WHETHER A DEFENDANT IN A CAPITAL MURDER TRIAL MUST BE ADVISED OF A RIGHT TO REMAIN SILENT; A RIGHT TO TERMINATE THE INTERVIEW; AND A RIGHT TO BE ASSISTED BY COUNSEL IN DECIDING WHETHER TO SUBMIT TO THE EXAMINATION BY A PSYCHIATRIST.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as Tex. Code Crim. Proc. Ann. art. 37.071(a), (b)(2) as set forth below.

The Fifth Amendment to the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

> twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Code Criminal Procedure

Article 37.071, sections (a) and (b)(2) are as follows:

> (a) Upon a finding that the defendant is

guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

* * *

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

* * *

STATEMENT OF THE CASE

The Crime

The facts of the offenses for which Respondent Smith was convicted and sentenced to death are as follows.

In the early morning hours of September 28, 1973, Respondent Smith, along with Howie Ray Robinson, entered a Sheppes Grocery Store in Dallas County, Texas. Since there were some customers in the store, they left and waited outside in a car along with George Holden. After the customers left, Smith and Robinson re-entered the store. Both were carrying firearms.

Robinson placed a package of lunchmeat and a jar of mustard on the counter while Smith held a gun on the cashier, William Moon, and said, "this is a holdup." Moon apparently made a motion to reach for something, possibly his wallet. Smith attempted to fire his gun but the gun misfired. He then shouted to Robinson either, "get him Howie" (Respondent's oral confession) or, "look out Howie" (Respondent's trial testimony). Robinson fatally shot Moon in the head. Smith walked behind the counter, took money and bills from the cash drawer, and got change from a cigar box below the counter. There was a pistol and holster on top of the cigar box and Smith also took those. They walked out of the store past a phone booth back to the car where George Holden was waiting. When they got into the car, Smith told Holden "man, we had to shoot somebody" (Smith's oral confession) and they proceeded to James Mitchell's apartment to divide the proceeds of the robbery. Smith, Robinson, and Holden each received approximately $200.00. Mitchell received $30.00 or $40.00 for allowing them to divide the money at his apartment.

Pretrial Proceedings

On October 7, 1973, Smith was given a Magistrate's Warning setting forth all of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). This Magistrate's Warning is required pursuant to Tex. Code Crim. Proc. Ann. art. 15.17 (Vernon). Counsel was appointed for Respondent on October 25, 1973. On October 25, 1973, Smith signed and agreed to a request for an interview by Officer C. E. Lewis, a police officer for the City of Dallas, Texas. At that time, Smith gave an oral confession to Officer Lewis enumerating the facts of the robbery and murder. This oral confession was introduced during the case in chief for the State. Prior to making the statement, Smith was again warned of his rights and waived them.[1]

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[1]Oral statements are not generally admissible in the State of Texas. Tex. Code Crim. Proc. Ann. art. 38.22 (Vernon). However,

On January 4, 1974, the attorneys for Respondent filed a Motion to List State Witnesses. That motion was for the purpose of establishing the existence of any relationships between witnesses and prospective jurors. (Tr. 21, A. 4).[2] That motion was granted without qualification as to the witnesses the State expected to use on the guilt or innocence stage of the trial. However, as to the witnesses to be used by the State during the punishment stage of the trial, the motion was granted only as to those witnesses if known at that time. (Tr. 22, A. 5). On February 1, 1974, the State in open court announced that it would seek the death penalty in the trial of Smith. (Tr. 23).

At the request of the state trial judge, a psychiatrist, Dr. James P. Grigson, examined Smith in the Dallas County Jail on February 18, 1974. He mailed a letter summary of the psychiatric evaluation of Smith to the Judge on February 28, 1974. That summary stated that Smith was competent and sane and was a severe sociopath. The letter was placed in the court's file. (Tr. 24, A. 6).

A list of witnesses was given to the defense attorney and was filed with the court on March 11, 1974. On that same day, March 11, 1974, voir dire proceedings commenced in the trial of Ernest Benjamin Smith.

Petitioner's oral statement led to the discovery of the gun and holster taken during the robbery-murder. Therefore, pursuant to Article 38.22(3)(c) this oral statement was admissible as containing an assertion of fact that is found to be true in the finding of stolen property.

[2]For convenience, documents found in the transcript of the state court record will be referred to as "Tr.". Portions of the record in the Statement of Facts of the state court trial will be referred to as "S/F", portions of the record of the federal habeas corpus proceeding will be referred to as "R" and portions of the record found in the supplemental transcript of the federal habeas corpus proceeding will be referred to as "S.R.".

The Trial

The voir dire examination was concluded on March 25, 1974. On that date, counsel for Smith requested numerous subpoenas to be issued. Included among the subpoena requests was one for the "book in records — custodian, Dallas Sheriff's Office — record of visitation of Dr. Grigson to Ernest Ben Smith." (Tr. 62, A. 8). That subpoena was issued on March 25, 1974.

The evidence presented by the State in its case in chief showed that in the early morning hours of September 27, 1973, Officer L. C. Caudell answered a radio call to proceed to the Sheppes Grocery Store. At that time, he observed a victim lying on his back with his arms at his side in a pool of blood. (S/F 2464). There was a wound in the left temple from which blood and what appeared to be brain matter was oozing out. (S/F 2464). At the time he was discovered he was breathing "gasping as if trying to get his breath." (S/F 2464). There was a jar of mustard and a package of luncheon meat on the counter. (S/F 2467). Finger prints were subsequently lifted from those two items. (S/F 2476, 2477). The fingerprints were subsequently identified as belonging to Howie Ray Robinson (S/F 2560).

Officer C. E. Lewis testified that part of the investigation concerned locating a Smith & Wesson .38 caliber revolver which was known to have been in the Sheppes Store at the time of the robbery-murder. (S/F 2504). Officer Lewis requested an interview with Smith. Smith's rights were explained to him. Smith stated he understood his rights. Smith further stated that he had understood his warnings from the Magistrate when he had been arraigned, and that he desired to waive his rights. (S/F 2503-04). As a result of the conversation with Smith, Officer Lewis was able to recover the .38 caliber Smith & Wesson revolver and holster. Smith gave Officer Lewis an oral confession to the robbery and murder. (S/F 2507-11, 2527-34). On cross-examination, the following testimony was elicited:

Q: Your investigation of this case, has it convinced you that Ernest Benjamin Smith was telling the truth with regard to who shot the clerk in the store?

A: Yes, Sir.

Q: Alright. In other words, not necessarily going by what you say he told you; but by your other investigation of this matter, are you convinced that Howie Robinson or someone other than Ernest Benjamin Smith killed the grocer?

A: No, sir, I am not totally convinced.

Q: You are not totally convinced of it?

A: No, sir.

Q: But you are totally convinced as to the other things that he told you?

A: Yes, sir, I am.

Q: Did he tell you that he had tried to shoot the grocer?

A: Yes, sir, he did.

Q: Did he appear to be remorseful about that in any way?

A: I saw no signs of emotion at all.

Q: In other words, he just talked to you in a conversational tone such as you are talking now?

A: Just about, yes, sir.

Q: You're saying he never showed any remorse?

A: No, sir.

Q: Did he tell you any reason or give you any motive why he would be so free with his information

to you?

A: Yes, sir. He told me he didn't want to take this murder rap.

(S/F 2543-44)

This witness further stated on cross-examination that "he stated to me that his gun malfunctioned and that it did not go off at the time. I asked him if the gun was loaded. He said it was." (S/F 2546).

The State also established that the cause of death was a close-range gunshot to the head. (S/F 2572-74). The bullet which was removed from the victim was identified as being fired from a .22 pistol which had been previously introduced as State's Exhibit No. 20. (S/F 2581).

When the State rested its case in chief, the defense called Ernest Benjamin Smith who testified in his own behalf. (S/F 2583-2657). Smith was the only witness presented by the defense. In his testimony, he admitted the crime. He testified on cross-examination that he had no problem sleeping after the crime. (S/F 2652). He also testified, "I picked up the cigar box and gave it to Howie and I picked up the pistol and on the way out, well, some change was dropped and I picked that up because I went out after he [Robinson] did." (S/F 2647). Smith was also asked if Robinson ever motioned his pistol at Smith or directed him to do anything. Smith's response was "if he did, it wasn't my knowledge." (S/F 2598).

On rebuttal, the State presented testimony from James Mitchell that Smith asked Mitchell to use his apartment to "split the money." (S/F 2668). At that time, Smith admitted the robbery to Mitchell. (S/F 2670). Mitchell testified that he declined to allow Smith to divide the money in his apartment. (S/F 2670). The next witness called by the State was Andrew Swift, who testified he bought the stolen gun and holster from Smith (S/F 2682). At that time, Smith had another gun,

a nickel plated automatic, which he was also trying to sell. (S/F 2682).

The next two witnesses called in rebuttal by the State were Yolanda Lewis and Martha White. White identified Smith as being a man who displayed a gun in September of 1973 in the Stop & Go drive-in grocery store where she was employed. (S/F 2692). Lewis identified Smith as being a man who displayed a gun in September, 1973, in Lowe's Bar-B-Q where she was employed as cashier. (S/F 2696). That testimony concluded the trial on guilt. The jury's verdict was guilty of capital murder. (Tr. 117).

At the beginning of the punishment trial, the State rested subject to their right to reopen. (S/F 2768, A. 11). The defense first presented the testimony of Robert Terry Roy who testified he had given a gun to Smith with the understanding that Smith was to repair it. (S/F 2772). The next witness was Sarah Smith, Ernest Benjamin Smith's step-mother. (S/F 2776-79). Louise Smith, the aunt of Ernest Benjamin Smith was the final witness called by the defense. (S/F 2779-81).

The State then called Dr. James P. Grigson to the stand. The defense requested an opportunity to take him on voir dire examination before his testimony was presented to the jury. (S/F 2782, A.12). Dr. Grigson testified that he did not know he would be testifying until that day at approximately 2:30 p.m. (S/F 2787, A. 15). The first indication that Dr. Grigson had that he might testify in this case occurred after the jury had been selected. (S/F 2787, A. 15). He had, however, discussed with the prosecuting attorney the report of his findings, a summary of which had been filed with the court.

Dr. Grigson testified that he had examined approximately eight thousand persons who had been charged with criminal offenses. (S/F 2794, A. 19). He had performed a mental status examination on Ernest

Benjamin Smith at the request of the trial judge. (S/F 2794, A. 19). The mental status examination was divided by Dr. Grigson into five parts. The first part was labeled as "General Appearance and Behavior." (S/F 2796, A. 20). This was basically an evaluation of a person's physical appearance. (S/F 2796, A. 20). The second part of the examination was called "A Production of Thought." This portion of the examination dealt with the manner in which thoughts come out and how they related to each other. (S/F 2796, A. 20-21). The third part of the examination was "Affect or Mood." In this, the doctor judged facial expression, tone of voice, gestures and body movements to determine an emotional state. (S/F 2797, A. 21). The fourth part of the examination is "Content of Thought." This portion of the examination deals with historical information as well as ability to discuss pending criminal charges. (S/F 2797-98, A. 21). The fifth and final part of the examination is the "Sensorium," which Dr. Grigson testified concerns individual orientation. (S/F 2798, A. 22). The doctor stated that the five different parts together determine how an individual is functioning emotionally and mentally. (S/F 2798, A. 22).

In regard to Smith's emotional state, Dr. Grigson testified that he could find no feelings of remorse. (S/F 2799, 2802, 2817, 2820, A. 22, 24, 33, 35). Dr. Grigson found that Smith had a sociopathic personality disorder. (S/F 2801, A. 23). The doctor's prognosis was that Smith would continue his previous behavior and would do it again in the future. (S/F 2802, A. 24). After this testimony on direct examination, defense counsel performed a thorough cross-examination of the doctor. (S/F 2805-18, A. 26-34)(2820, A. 35).

The Appeal and Collateral Proceedings

The Texas Court of Criminal Appeals affirmed Respondent's conviction and sentence on February 18, 1976. *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App.

1976). (A. 37). At the time the court issued its affirmance, two judges filed dissenting opinions. (A. 48). However, on Motion for Rehearing, both judges withdrew their dissents. (A. 47).

Respondent Smith was formally sentenced to death on October 20, 1976, by the trial court. His execution was set for November 22, 1976. A Stay of Execution pending timely filing of a petition for writ of certiorari was granted by this Court on November 6, 1976. On March 7, 1977, this Court denied the petition for writ of certiorari. *Smith v. Texas*, 430 U.S. 922 (1977).

On March 22, 1977, Respondent Smith was again formally sentenced and the execution was scheduled for April 26, 1977. On April 18, 1977, Smith presented an application for writ of habeas corpus to the state trial court. On April 19, 1977, Smith presented an application for stay of execution to the Texas Court of Criminal Appeals. It was considered as an original writ of habeas corpus and denied in a written opinion on April 20, 1977. On April 21, 1977, Smith filed an application for stay of execution and an application for writ of habeas corpus in the United States District Court for the Northern District of Texas, Dallas Division. That application for stay of execution was granted on April 22, 1977. In Smith's application for writ of habeas corpus, he alleged, along with numerous other allegations, that "the introduction of the testimony of Dr. Grigson at Petitioner's trial violated his privilege against self-incrimination and his rights to fair notice and effective assistance of counsel." (R. 21-23, A. 72-73).

A preliminary order was entered by the United States District Judge on April 29, 1977. (R. 41-42, A. 88-89). That order directed the Attorney General's Office to file an answer not later than May 20, 1977, along with the entire transcript from Smith's state proceedings. The order also directed Smith to file not later than May 20, 1977, "a report detailing with specificity the factual disputes in this case." (R. 41, A. 88). The State's Answer

denied that the statements made by Smith to Dr. Grigson violated any Fifth Amendment privilege or Sixth Amendment right to have counsel present during the examination. In the Answer, the State also contended that counsel for Smith was aware of the results of the examination. (R. 50, A. 96). A letter was filed with the court on August 25, 1977, from counsel for Smith detailing the issues which he believed entitled him to relief without a hearing. However, the due process contention upon which the court ultimately granted relief was not one of these issues set forth in that August 25, 1977, letter. (S.R. 8-10, A. 104-6).

On October 6, 1977, the United States District Court Judge wrote a letter to one of Smith's counsel requesting answers to certain questions in the form of an affidavit. (S.R. 6-7, A. 107-8). By copy of that letter, the State was instructed to file controverting affidavits if they so desired. Affidavits, both in question and answer form and in narrative form, were filed by John F. Simmons and Howard Wilson, Smith's trial counsel, on October 12, 1977. (R. 84-90, A.109-116). On October 21, 1977, a controverting affidavit from R. T. Scales, the state trial judge, was filed with the court. (R. 90-92, A. 117-119). Judge Scales stated that he appointed Dr. Grigson to examine Smith. He further stated that "in all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial." (R. 91, A. 117). He further states "as best I recall, I informed John Simmons, the attorney for the Defendant, that I had appointed Dr. Grigson to examine the Defendant and that a written report was mailed to me." (R. 91, A. 118). Judge Scales's affidavit went on to recite, "I received a letter, dated 28 February 1974, from Dr. Grigson which stated that he had examined the Defendant on 18 February 1974. Such letter summarized Dr. Grigson's findings. Such letter was placed in the court records and was thereby made available to both the Defense and the State." (R. 92, A. 118).

On December 21, 1977, a letter was sent by defense counsel to the United States District Judge making reference to a conversation between the attorney and the Judge's law clerk. (S.R. 5, A. 120). In that letter, counsel stated he was furnishing an affidavit as to information requested and was hand-carrying a copy to an Assistant Attorney General in Dallas, Texas. In that affidavit of December 21, 1977, John F. Simmons set forth the reasons he did not make specific objection to Dr. Grigson's testimony and further stated he was surprised by that testimony. (R. 95, A.121).

Nine days later, December 30, 1977, the United States District Court entered a Memorandum Opinion and Final Judgment granting relief to Smith insofar as his death sentence. (R. 59, A. 124). That order left undisturbed the conviction. The reasons set forth in the Memorandum Opinion for vacating the death sentence were (1) a denial of due process in the manner in which the psychiatric testimony was presented; (2) a denial of a right to present complete testimony regarding mitigating factors on his personality; (3) a denial of the right to effective assistance of counsel from the previously found denial of due process in the presentation of testimony which hindered counsel in its duties; and (4) a denial of a Fifth Amendment right to remain silent at a psychiatric examination and the psychiatrist's failure to advise Smith of such right.

On January 9, 1978, the State filed a Motion for New Trial contesting the fact that no evidentiary hearing was conducted to resolve the factual issues or to resolve the conflict between the affidavit submitted by the trial judge and those submitted by the defense attorneys. That motion further pointed out that no objection was made in the trial court pursuant to any denial of Fifth or Sixth Amendment rights in the manner in which the psychiatric testimony was obtained or introduced. The Motion for New Trial was overruled on March 27, 1978.

On April 4, 1978, a Notice of Appeal to the United

States Court of Appeals for the Fifth Circuit was filed. In that appeal, the State raised, among other grounds, the contentions that there had been no denial of due process, that there was no Fifth Amendment privilege in the manner in which the psychiatric testimony was obtained and introduced in this case, and further, that counsel for Smith had waived any such privilege by failing to make a correct contemporaneous objection at trial.

The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court on September 13, 1979. *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979). Rehearing and rehearing en banc were denied on October 22, 1979. It is that opinion of the United States Court of Appeals to which this Writ of Certiorari is directed.

SUMMARY OF ARGUMENT

There was no due process violation either in the manner by which the psychiatric testimony was presented at Respondent's trial or in the nature of the testimony itself. The United States Court of Appeals, citing *Gardner v. Florida*, 430 U.S. 349 (1977), found that Respondent Smith was denied due process of law when the death sentence was imposed after psychiatric testimony had been presented in open court during the punishment stage of the trial. Unlike *Gardner*, the testimony in question was presented in open court with the opportunity for cross-examination and rebuttal. The facts in Respondent Smith's trial more closely align it with *Williams v. New York*, 337 U.S. 241 (1949).

The court below found that the denial of due process stemmed from the "surprise" to defense counsel when the psychiatric evidence was presented. This finding was based in part on defense counsel's objection that the name of the psychiatrist did not appear on the witness list. The facts, as developed at trial, reflect that the psychiatrist did not know he would testify until

approximately 2:30 p.m. on the day he was called. A report to the trial court from the psychiatrist summarizing his findings had been previously placed in the court file and was available to counsel for both the defense and the prosecution.

Counsel for Respondent did not object on the basis of due process or on the grounds of surprise, nor did they ask for a continuance pursuant to Texas procedure. Since the testimony was presented in open court and Respondent had the opportunity to object, to cross-examine and to present rebuttal evidence, there was no denial of due process by the presentation of this testimony.

It is essential that a sentencing jury in a capital murder trial have before it all possible relevant information as to the individual offender. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Evidence of the psychological characteristics of a criminal defendant has often been used in presentencing evaluations. Just as a trial court has wide latitude in making a sentencing determination, largely unlimited either as to the kind of information or the source of such information, so should the sentencing jury have access to such information.

The diagnosis of Respondent as a sociopath is not such "mis-information of constitutional magnitude" as to deny due process. There is both scientific and legal authority for an analysis of a sociopathic personality. The evidence introduced during the guilt trial, including Respondent's own testimony, is supportive of the diagnosis of the psychiatrist. That evidence showed that Respondent by his actions had displayed no remorse. The jury was entitled to evaluate the opinion testimony from the expert witness in making the sentencing determination.

It must further be noted that counsel for Respondent made no objection on the grounds now asserted at the time of trial. Under Texas law, all rights, even

constitutional rights, may be waived in a capital trial, except for the right of a jury trial. *Boulware v. State*, 442 S.W.2d 677 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 959 (1977). An objection to admission of evidence must be specific and must state the exact grounds of the objection. At no time did counsel for Respondent make an objection on the grounds of denial of confrontation or denial of opportunity to cross-examine the witness.

Further, the proper procedure when a defendant is surprised by testimony presented against him, is for the defendant to move for a continuance pursuant to Tex. Code Crim. Proc. Ann. art. 29.13 (Vernon). There must be a request to postpone or continue for the error to be considered. Otherwise, the defendant has waived his complaint of surprise. *Hays v. State*, 36 S.W.2d 1029 (Tex.Crim.App. 1931).

Since state law requires a specific objection and a motion for continuance if the objection is based on surprise, and since counsel had the opportunity to lodge such objection and move for continuance, the error, if any, in the presentation of the psychiatric testimony was waived.

The court below held not only that due process was violated, but also set forth certain evidentiary limitations on the presentation of psychiatric testimony for determination of punishment. Those limitations, based on the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966) are inapplicable to the presentation of testimony after the finding of guilt in a capital murder trial.

The issue of the incrimination of the defendant was resolved by the jury finding of guilt, which in this case was based at least in part on a voluntary oral confession and Respondent's testimony during the guilt stage of the trial. The Fifth Amendment privilege is against compelled self-incrimination. Therefore, since the incrimination is no longer an issue, the Fifth

Amendment privilege does not apply.

The jury determinations on punishment were not directed to the criminal culpability of Respondent, but were an evaluation of the character of Respondent as an individual in order that the appropriate punishment might be assessed. The testimony of the psychiatrist was not gained through a coerced confession to crime, nor were the statements of Respondent used to show his guilt of the offense charged.

Miranda v. Arizona, supra, defined a limited category of questioning during which warnings were judicially mandated. The limitation has been strictly applied to areas in which law enforcement officers have sought to gain incriminating evidence.

A psychiatric examination is not an inherently coercive interrogation in the same sense as an involuntary confession. Therefore, since the psychiatric examination was not performed by an agent of law enforcement, nor was the purpose of the examination to seek evidence of guilt, *Miranda v. Arizona* does not apply.

The Fifth Amendment privilege against self-incrimination is not self-executing. It must be invoked in a timely manner. Respondent waived his privilege against self-incrimination at the guilt stage of the trial. He had previously waived his privilege when he confessed orally.

Both Texas law and federal law require that the privilege be asserted or, if a defendant believes his privilege to be violated, that he make an objection at the time of trial. Absent the assertion of the privilege at the time of the communications and a correct contemporaneous objection at trial if privileged testimony is introduced, the privilege is waived.

During the litigation of the writ of habeas corpus, a hearing was never conducted to fully develop the factual

issues. The power of the federal courts under 28 U.S.C. §2254, is plenary, not appellate. There must be an opportunity for both the state prisoner and the state itself to be heard, to argue and present evidence, and to confront and cross-examine witnesses. The integrity of the state judicial system should not be overridden on the basis of an incomplete factual determination.

ARGUMENT AND AUTHORITIES

I. THERE WAS NO DUE PROCESS VIOLATION IN THE PRESENTATION OF THE PSYCHIATRIC TESTIMONY.

A. Due Process was not Violated by the Manner in Which the Testimony was Presented.

As stated in *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) *citing In Re Oliver*, 333 U.S. 257, 273 (1948):

> ...due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Respondent Smith contends, and the courts below held, that he was denied these due process rights in the manner in which the testimony of the court-appointed psychiatrist was presented during the punishment phase of Petitioner's capital murder trial. In reaching the conclusion that due process was denied, the Court of Appeals relied upon *Gardner v. Florida*, 430 U.S. 349 (1977). The facts evident from the record in this case distinguish it from the holding in *Gardner v. Florida*, *supra*, and more closely align it with the fact situation in *Williams v. New York*, 337 U.S. 241 (1949). Both *Gardner* and *Williams*, like the instant case, involved a capital conviction in which the defendant was sentenced to death.

In *Gardner*, the State of Florida relied upon the testimony at the trial on guilt and additionally introduced two photographs of the decedent on the punishment phase of the trial. Gardner introduced in mitigation, testimony of consuming a vast amount of alcohol and professed to have almost no recollection of the assaultive act itself. That testimony was sufficient to support at least one of the mitigating circumstances under the Florida statute. The jury, after evaluating all the evidence, recommended to the trial court that a sentence of life be imposed. It expressly found that the mitigating circumstances outweighed the aggravating circumstances.

Under Florida procedure, the trial court may reject the recommendation of the jury and assess punishment as it deems appropriate. The trial judge in *Gardner* requested a presentence investigation report. Based on that report, as well as the trial evidence, the court found that the felony "was especially heinous, attrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to wit: none." *Gardner v. Florida*, 430 U.S. at 353. A portion of that presentence investigation report was deemed to be confidential by the trial court and was never submitted to trial counsel for their inspection. Since this presentence report was the only item considered by the judge but not by the jury, it appeared that the report was of paramount importance in the trial court's decision to overturn the jury's advisory verdict. This Court, therefore, held that Gardner was denied due process of law when the death sentence was imposed "at least in part, on the basis of information which he had no *opportunity* to deny or explain." 430 U.S. at 362. (emphasis added).

In *Williams v. New York*, 337 U.S. 241 (1949), the trial court likewise assessed punishment at death overturning a jury's recommendation of life. Once again, the trial court relied strongly on a presentence report which had not been submitted to the jury.

However, unlike the proceedings in *Gardner v. Florida*, the trial court judge in *Williams v. New York*, stated in open court, before the defendant, the facts which, in his belief, justified a death sentence. The defendant was given the opportunity to make statements as to why sentence should not be imposed and his counsel was given the opportunity to make extended argument. Because the defendant was given an opportunity in open court to address the information contained in the presentencing report, this Court held that there was no denial of due process.

In the case at bar, after a finding of guilty to the aggravated offense of capital murder, the State presented the testimony of a psychiatrist, Dr. James P. Grigson, for the purpose of showing Respondent's mental status and his propensity to commit crime. This testimony was presented in open court before the jury and judge. The Defendant had the opportunity to cross-examine Dr. Grigson as to his conclusions, and further, the Defendant had the opportunity, if he so desired, to testify in his own behalf in order to rebut any of the conclusions made by the psychiatrist. In *Gardner v. Florida*, as well as in *Williams v. New York*, evidence of psychological analysis was contained in the presentence reports considered by the judges in assessing punishment. Here, not only were the conclusions of the psychological analysis presented in open court with the ability for cross-examination and rebuttal, but the psychiatrist himself was available to explain the basis for his conclusions.

The courts below found that the denial of due process stemmed in large part from the "surprise" to defense counsel when this evidence was presented. This was based in part on defense counsel's objection at the time the evidence was presented that Dr. Grigson's name had not appeared on a witness list. At the time the request was made for a witness list, the trial court granted it as to punishment witnesses only if known at that time. The request was made on January 4, 1974. (Tr. 21, A.5).

On March 11, 1974, a prospective list of witnesses was filed. (Tr. 25, A. 7). From Dr. Grigson's own testimony he knew only that he was going to be called as a witness at approximately 2:30 p.m. on the day he testified. (S/F 2787, A. 15).

After the letter was sent to the trial judge by Dr. Grigson, the assistant district attorney discussed the findings with the psychiatrist. (S/F 2887-2788, A. 15-16). At that time, the assistant district attorney did not indicate to Dr. Grigson that he would be called as a witness. (S/F 2788, A. 15). The first indication that Dr. Grigson had that he would probably be asked to testify was on Thursday, March 21, 1974, ten days after the witness list was filed. (S/F 2788, A. 15).

The failure to include Dr. Grigson's name on a witness list, especially if it was not known at the time such witness list was submitted that Dr. Grigson would be a witness, does not rise to the level of a constitutional violation. There is no general constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545 (1977). The testimony of Dr. Grigson did not encompass any information of an exculpatory nature which would have been beneficial to the defense. *See and compare, Brady v. Maryland*, 373 U.S. 83 (1963).

Dr. Grigson had been appointed by the trial court to examine the mental status of the Defendant. A letter summarizing his findings was sent to the trial court and was placed in the court's file. The letter was thus equally available to both the defense or the prosecution. (S/F 2785, A. 13). Respondent Smith himself surely knew of the interview. And contrary to the allegations of his counsel in affidavits submitted to the federal district court (R. 94-95, A. 121-122) that counsel attached no significance to the interview and subsequent summary report, counsel did request a subpoena for the records of the visit of Dr. Grigson to Respondent Smith in jail. (Tr. 62, A. 8). That subpoena request was filed and the subpoena was issued on the day prior to Dr. Grigson's

testimony. After counsel for Respondent Smith examined Dr. Grigson prior to his testimony, the court granted a recess of an hour and counsel agreed that an hour was acceptable. (S/F 2790, A. 17).

The only objection which counsel for Respondent Smith made at the time Dr. Grigson was called to testify was that Grigson's name did not appear on the witness list. He objected neither as to any due process violation nor on the grounds of surprise. It must be remembered that Respondent was represented by competent local counsel familiar with local procedure. *Henry v. Mississippi*, 379 U.S. 443 at 449, n.5 (1965).[3] Even if counsel was unaware of the nature of Dr. Grigson's testimony at the outset, when it became apparent that Grigson was going to offer an opinion as to a behavior prediction, an objection could have been lodged. Not only was no objection lodged, but counsel for the defense stated "he can ask for the man's opinion." (S/F 2803, A. 25). Due process does not guarantee perfect counsel and the federal district court in this case expressly "decline[d] to...[find counsel ineffective]." *Smith v. Estelle*, 445 F.Supp. 647, 658 n.16 (N.D.Tex. 1977)(A. 139).

The Court of Appeals reasoned that the failure of the prosecution to specifically inform Smith of the nature of Dr. Grigson's testimony and the fact that Grigson might testify denied him due process as much as a failure to present such testimony in open court subject to cross-examination and rebuttal. In support of this theory, the

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[3]Indeed, this was not the first capital murder trial in which counsel appointed for Respondent Smith had participated. In the month previous to this trial, both counsel had participated as defense counsel in the case of William David Hovila. *Hovila v. State*, 532 S.W.2d 293 (Tex.Crim.App. 1975). Official records of the Court of Criminal Appeals reflect that Dr. Grigson had testified that as a result of a mental status examination, he found Hovila to have a sociopathic personality disorder which would cause him to commit acts of violence.

court cited *Riggs v. United States*, 280 F.2d 750, 753-54 (5th Cir. 1960). In *Riggs*, testimony was presented by the prosecution for proof of offenses which were not alleged in the indictment and of which the defendant had no notice.

But Respondent Smith was on notice by indictment that he was charged with capital murder. Clearly, under the requirements of the statutory provisions, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon), the prosecution was required to prove "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. art. 37.07l(b)(2)(Vernon). If there was any doubt as to whether the State would truly seek a death sentence, it was eliminated by the State's formal notice of intention to seek the death penalty on February 1, 1974. (Tr. 23). Respondent Smith, having been fully aware of the charges against him, cannot claim surprise or lack of notice by the State's efforts to prove all necessary elements of those charges. *Spinkellink v. Wainwright*, 578 F.2d 582, 609 (5th Cir.), *cert. denied* 440 U.S. 976 (1978).

B. Due Process was not Violated by the Nature of the Psychiatric Testimony.

Due process and a fundamental respect for humanity require "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). This Court has recognized that information concerning the defendant's characteristics is vital for the jury to make a reasoned determination of sentence. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). In *Jurek v. Texas*, 428 U.S. 262, 276 (1976), the Court stated:

> The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

The capital murder statutes struck down as unconstitutional in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Bell v. Ohio*, 438 U.S. 637 (1978), limited the consideration of possible mitigating evidence as to the character of the individual offenders. A presentence report was requested by the trial judge in *Lockett*. The psychiatric and psychological reports described the defendant as not suffering from a mental deficiency, but one of the psychologists reported that her "prognosis for rehabilitation" if returned to society was favorable. 438 U.S. at 594. Since evidence of this nature did not fall within the statutorily enumerated mitigating circumstances, the court was unable to consider this diagnosis in determining sentence. Unlike Ohio, Texas allows consideration of such testimony, whether mitigating or aggravating. In fact, reversible error results if the defense is prohibited from presenting psychological evidence on lack of sociopathic personality traits and favorable prognosis for rehabilitation. *Robinson v. State*, 548 S.W.2d 63 (Tex.Crim.App. 1977).

The use of psychiatric evaluation as evidence in a capital sentencing determination has been widespread. In *Proffitt v. Florida*, 428 U.S. 242 (1976), evidence was introduced that Proffitt had an uncontrollable desire to kill and was dangerous. After receiving that testimony, the jury returned an advisory verdict recommending the sentence of death. Before assessing sentence, the trial judge ordered an independent psychiatric

evaluation. The trial judge sentenced Proffitt to death, finding as one of the aggravating facts a propensity to commit murder. Psychiatric evaluations were also ordered prior to sentencing in *Gardner v. Florida*, 430 U.S. 349 (1977); and *Williams v. New York*, 337 U.S. 241 (1949). Psychiatric testimony has also been used in *Witt v. State*, 342 So.2d 497 (Fla. 1977); *Alvord v. State*, 322 So.2d 533 (Fla. 1975); *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978); *Mason v. Commonwealth*, 254 S.E.2d 116 (Va. 1979); *Presnell v. State*, 243 S.E.2d 496 (Ga.), *rev'd and remanded* 439 U.S. 14 (1978). In all of those capital cases, a collateral attack is now proceeding based upon the Fifth Circuit opinion in *Smith v. Estelle*. The petitioners in those collateral proceedings contend that the absence of warnings prior to the psychological examination rendered the testimony invalid in violation of their constitutional rights.

Just as a trial judge has wide latitude in making a sentencing determination largely unlimited either as to the kind of information or the source of such information, so should the sentencing jury have access to such information. *See, United States v. Grayson*, 438 U.S. 41 (1978); *United States v. Tucker*, 404 U.S. 443, 446 (1972). The demeanor of the accused may legitimately be considered as a factor in sentencing. *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973).

The primary limitation on the reception of evidence for sentencing is "misinformation of constitutional magnitude." *United States v. Tucker, supra.* The psychiatric testimony introduced for sentencing at Respondent Smith's trial was not of this nature.

The diagnosis of an offender as a sociopath or psycopath[4] has been an accepted diagnosis of a certain

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[4]Although the terms "psycopath" and "sociopath" are used interchangeably in most technical literature, the term "sociopath" has been in greater favor for this personality type since the 1950s. The term "anti-social personality" has recently been substituted in place of "sociopath" by some commentators.

personality order for more than one hundred fifty years.[5] The principal trait of a sociopath is a lack of guilt or remorse for the acts he commits.[6] "The psycopathic personality seems to be a character type that everyone can describe at least in a general sense from everyday encounters." S. Yochelson & S. Samenow, *The Criminal Personality, Vol. I: A Profile For Change*, 96 (1976).

Although some commentators have criticized this type of testimony in regard to anti-social personalities,[7] the analysis made by Dr. Grigson is not without professional support.[8] Psychiatrists do testify in a large percentage of capital cases and their testimony may provide insight for the jury into the personality of the offender whose fate they must determine.[9] It has been suggested that a diagnosis of sociopathy may serve as a mitigating factor, not merely an aggravating factor, in a capital sentencing decision.[10] It must be remembered that the jury, as trier of fact, may accept or reject expert testimony like any other evidence. Texas juries have returned answers requiring a life sentence in cases where psychiatric testimony of future dangerousness

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[5]W. McCord & J. McCord, *The Psycopath: An Essay On The Criminal Mind*, (1964).

[6]Craft, *Psycopathic Personalities: A Review of Diagnosis, Aetiology, Prognosis, and Treatment*. Brit. J. Criminology, Vol. I, No. 3 (Jan. 1961).

[7]Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*. 5 Am. J. Crim. L. 151 (1977).

[8]Ayres & Holbrook, *Law Psychotherapy and the Duty to Warn: A Tragic Trilogy*? 27 Baylor L. Rev. 677, 695-705 (1975).

[9]*See*, Crump, *Capital Murder: The Issues In Texas*, 14 Hous. L. Rev. 531 (1977).

[10]Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L. J. 757, 789 (1978).

has been presented.[11]

The evidence upon which Respondent Smith had been found guilty was before the jury for consideration of punishment. That evidence supports both the verdict and the analysis of the psychiatrist.

Smith stated that he planned the robbery, and orally confessed to being the first to fire a gun. (S/F 2530).[12] Smith further testified that he stood there after the shooting and made no effort to help the victim although he was still alive. (S/F 2597, 2464). He coldly walked across the victim to get money, stopping long enough pick up coins which he had dropped. (S/F 2532, 2627-28, 2634-35). After the murder and division of the robbery

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[11]*State v. Milton James Anthony*, a capital murder conviction from Hill County, Texas, in which the defendant was convicted of capital murder during the robbery of a filling station. The attendant was beaten to death with coke bottles. Testimony of Dr. Grigson was introduced at the punishment trial.

State v. James Harold Lorance, a capital murder conviction from Lamar County, Texas, for murder during the burglary of a habitation. Psychiatric testimony was presented during the punishment trial.

State v. William Ray Walker, a capital murder conviction from Hunt County, Texas,now on appeal as Texas Court of Criminal Appeals No. 58,687. The offense was murder of a peace officer. Psychiatric testimony was presented during the punishment trial.

State v. Federico Losoya, a capital murder conviction from Bexar County, Texas, for the murder of a peace officer. Psychiatric testimony from hypothetical questions based on facts and evidence was presented at the punishment trial.

State v. Ernesto Granado Guillen, a capital murder conviction from Bexar County, Texas, for murder while committing rape. Psychiatric testimony was presented at the punishment trial.

[12]A sociopath "robs a store in a whim of the moment, not after careful consideration." W. McCord & J. McCord, *supra* n.5, at 10. Compare Smith's testimony at (S/F 2593, 2616).

proceeds, Smith went to the apartment of a woman who had invited him to a party. (S/F 2650). He had no trouble sleeping that night. (S/F 2650).[13] All of these factors, coupled with Smith's willing participation and leadership in the crime, leads to the reasonable conclusion that the murder was committed during the course of a calculated robbery for which crime Smith showed no remorse.[14] Dr. Grigson concluded on the basis of his examination and experience that there was no real treatment for a sociopathic personality such as Smith.[15]

The opinion testimony was subject to cross-examination and rebuttal, yet Smith himself did not take the stand to rebut the inference of lack of remorse. This type of testimony is the same type presented to courts in making sentencing evaluations. The need for information concerning the character of the offender is vital to the sentencing determination. *Gregg v. Georgia*, 428 U.S. 156, 190 (1976). Though professional authorities are divided on the ethical considerations and

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[13]W. McCord, & J. McCord, *supra* n.5 at 51: "The total pattern of the psycopath's personality differentiates him from the normal criminal. His aggression is more intense, his impulsivity more pronounced, his emotional relations more shallow. His guiltlessness, however, is the critical distinguishing trait. The normal criminal has an internalized, albeit warped, set of values. If he violates these standards, he feels guilt."

[14]The same factors showing lack of remorse are those factors which would cause a layman, by exercising common sense, to conclude that a person was "cold blooded" or "remorseless." The technical requirements of psychiatric training do not require the abandonment of common sense.

[15]O. Kernberg, *Borderline Conditions and Pathological Narcissism*, (1975).

"The anti-social personality may be considered a subgroup of the narcissistic personality." *Id.*, 18.

"Anti-social personalities in a strict sense have the worst prognosis for any kind of psychological treatment." *Id.*, 139.

validity of the testimony of future dangerousness,[16] there is no showing that the opinion testimony of the psychiatrist in this case contained "misinformation of constitutional magnitude" or that the testimony itself constituted a denial of due process.

C. The Error, if any, in the Admission of the Psychiatric Testimony, was Waived by Counsel's Failure to Object on the Specific Grounds of Surprise or Denial of Confrontation and Cross-Examination.

Under Texas law, all rights, even constitutional rights, may be waived in a capital trial, except for the right of jury trial. Tex. Code Crim. Proc. Ann. art. 1.14 (Vernon); *Boulware v. State*, 442 S.W.2d 677 (Tex.Crim.App. 1976), *cert. denied* 430 U.S. 959 (1977). An objection to admission of evidence must be specific and must state the exact grounds of the objection. *Mutscher v. State*, 514 S.W.2d 905, 915 (Tex.Crim.App. 1974), *citing* 5 Tex.Jur. 2d, *Appeal and Error - Criminal Cases*, §41 at 68 (1959). A specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. A specific objection is also required to afford opposing counsel an opportunity to remove the basis for the objection or supply other testimony. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex.Crim.App. 1977).

The constitutional right of a defendant to confrontation and the right to cross-examine the witnesses against him may be waived. *Griffith v. State*, 391 S.W.2d 428 (Tex.Crim.App. 1965); *Villareal v. State*, 214 S.W.2d 464 (Tex.Crim.App. 1948). At no time did counsel for Respondent Smith make an objection on the grounds of denial of confrontation or denial of opportunity to cross-examine the witness. Therefore, pursuant to state law, that objection is waived.

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[16]Dix, *supra* n.7.

Although Respondent Smith's Motion in Limine as to witnesses not on the March 11, 1974, witness list, was granted, such a motion is subject to reconsideration by the court throughout the course of the trial. *Norman v. State*, 323 S.W.2d 669 (Tex.Crim.App. 1975). A motion in limine may not be enforced to exclude properly admissible evidence. *Id.* The proper procedure when a defendant is surprised by testimony presented against him, is for the defendant to move for a continuance pursuant to Tex. Code Crim. Proc. Ann art. 29.13 (Vernon).[17] If a motion for continuance based on Article 29.13, is not made at time of trial, a defendant cannot urge on appeal that he was surprised. *Hays v. State*, 36 S.W.2d 1029 (Tex.Crim.App. 1931). There must be a request to postpone or continue for the error to be considered. Otherwise, the defendant has waived his complaint of surprise. *Hays v. State, id.*; *Alsup v. State*, 210 S.W. 195, 196 (Tex.Crim.App. 1919); *Knight v. State*, 144 S.W. 967, 977-78 (Tex.Crim.App. 1912).[18]

> It is even more important, however, that we follow the demands of procedural rules set down in our criminal code and the decisions of this Court. Without the consistency and predictability which result from such a policy, attorneys could not act with certainty to protect the interests and rights of clients, nor could defendants be assured of a fair and equal administration of justice.

Jones v. State, 501 S.W.2d 677, 679 (Tex.Crim.App. 1973).

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[17]Formerly, Tex. Code Crim. Proc. Ann. art. 551 (1925).

[18]*Cf. Novak v. State*, 384 S.W.2d 140 (Tex.Crim.App. 1964); *Crawford v. State*, 305 S.W.2d 362 (Tex.Crim.App. 1957). Unless there is a motion for continuance based on the absence of a witness, any complaint alleged as to an absent witness cannot be considered.

Respondent Smith was represented by competent local counsel familiar with local procedure. *Henry v. Mississippi*, 379 U.S. 443 at 449, n.5. Absent a correct contemporaneous objection, on the grounds now asserted, the error, if any, is waived. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Even if counsel were unaware of the nature of Dr. Grigson's testimony at the outset, when it became apparent that Dr. Grigon was going to offer an opinion as to a behavior prediction, an objection could have been lodged. Not only was no objection lodged, but counsel for the defense stated "he can ask for the man's opinion." (S/F 2803, A.25).

Since state law requires a specific objection and a motion for continuance if the objection is based on surprise, and since counsel had the opportunity to lodge such objection and move for continuance, the error, if any, in the presentation of the psychiatric testimony was waived.

II. THERE WAS NO VIOLATION OF RESPONDENT SMITH'S FIFTH AND SIXTH AMENDMENT RIGHTS IN THE TESTIMONY EVALUATING HIS MENTAL STATUS.

A. The Evidentiary Limitations of *Miranda v. Arizona*, 384 U.S. 436 (1966) are Inapplicable to the presentation of Testimony for Determination of Punishment.

The psychiatric testimony was presented in open court after Ernest Benjamin Smith had been found guilty of capital murder during the course of committing robbery. The issue of his incrimination was resolved by that jury finding, which in this case was based at least in part on a voluntary oral confession and Smith's testimony during the guilt stage of the trial.

The State, while respecting the "inviobility of the

human personality,"[19] is nonetheless entitled, indeed mandated, to present to the sentencing jury evidence relevant to the character of the individual offender. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). The punishment must be appropriate for the offender, not merely the crime. *Roberts v. United States*, 48 U.S.L.W. 4370, (U.S. April 15, 1980) (No. 78-1793); *Williams v. New York*, 337 U.S. 241, 247 (1949). If " 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come' ", *United States v. Grayson*, 438 U.S. 41, 50 (1978), *quoting United States v. Tucker*, 404 U.S. 443, 446 (1972), then surely a sentencing jury must be allowed to consider the same type of information if deemed admissible and relevant by the trial judge. *See also*, Fed. Rules Crim. Proc. Ann. rule 23 (West).

The Fifth Amendment addresses only a relatively narrow scope of inquiry. "Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise." *Garner v. United States*, 424 U.S. 648, 655 (1976). The privilege is against compelled self-incrimination. By its very definition, incrimination is complete once guilt has been adjudicated.[20] Therefore,

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[19]*Miranda v. Arizona*, 384 U.S. 436, 460 (1976) "...the constitutional foundation underlying the privilege is the respect a government - state or federal - must accord to the dignity and integrity of its citizens."

[20]Webster's New International Dictionary of the English Language, 1260 (2d ed. unabr. 1957) "Incriminate...To charge with a crime or a fault; to criminate; to accuse..."

Black's Law Dictionary, 690, 691 (5th ed. 1979) "Incriminate. To charge with a crime; to expose to an accusation or charge of crime;..."

"Incriminating evidence. Evidence which tends to establish guilt of the accused or from which, with other evidence, his or her guilt may be inferred."

since the incrimination is no longer at issue, the Fifth Amendment privilege does not apply.

The right to silence described in *Miranda v. Arizona*, 384 U.S. 436 (1966) "derives from the Fifth Amendment and adds nothing to it." *Roberts v. United States, supra* at 4372. The *Miranda*-type warnings set forth by the United States Court of Appeals expanded the evidentiary prophylactics of *Miranda* into an area not clearly protected by the Fifth Amendment. The decisions of this Court have established only that self-incriminating statements obtained during custodial interrogation in violation of the rules set forth in *Miranda v. Arizona, supra*, may not be admitted against the accused, at least during the State's case in chief. *Fare v. Michael C.*, 442 U.S. 707, 718 (1979).

The Texas Court of Criminal Appeals has held that testimony of a psychiatrist, based upon his examination of a defendant, and introduced in the punishment stage of a capital murder trial does not violate the defendant's rights against self-incrimination. *Garcia v. State*, 581 S.W.2d 168 (Tex.Crim.App. 1979); *Von Byrd v. State*, 569 S.W.2d 833 (Tex.Crim.App. 1978), *cert. denied*, 441 U.S. 967 (1979); *Shippy v. State*, 556 S.W.2d 246 *Livingston v. State*, 542 S.W.2d 655 (Tex.Crim.App. 1976), *cert. denied* 431 U.S. 933 (1977).

Smith was found guilty by a jury after waiving his Fifth Amendment privilege against *self-incrimination.* The questions submitted to the jury on punishment were not directed to the criminal culpability of Smith, but were a focusing guide for the jury in the evaluation of the character of Smith as an individual in order that the appropriate punishment might be assessed. *Jurek v. Texas*, 428 U.S. 262 (1976). It was the characteristics, both aggravating and mitigating, of Smith as a convicted offender which were of moment, not the issue of his guilt.

The testimony of the psychiatrist as to Smith's

statements to him was not "the cruel simple expedient" of compelling *a confession to crime*, nor were the statements of the defendant used to show his guilt of the offense charged. *See, Chambers v. Florida*, 309 U.S. 227 (1940). Therefore, there was no privielge to be violated, and correspondingly, there was no entitlement to the evidentiary protections of *Miranda v. Arizona, supra.*

B. The Psychiatric Examination was not a Custodial Interrogation Within the Meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966).

In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), this Court defined a limited category of questioning during which warnings were judicially mandated.

> By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

This limitation has been strictly applied to areas in which *law enforcement officers* have sought to gain incriminating evidence from a defendant or one suspected of criminal acts. *Roberts v. United States, supra* at 4372; *Beckwith v. United States*, 425 U.S. 341 (1976); *Michigan v. Tucker*, 417 U.S. 433 (1974).

The interview of Smith by Dr. Grigson was not a coercive law enforcement interrogation. The psychiatrist was court-appointed to examine the mental status of Smith. He was not acting as an agent of the State to obtain self-incriminating evidence by subterfuge or trickery. His conclusions were available to both parties.

In areas such as this psychiatric examination, where the State is not deliberately seeking to avoid the burdens of independent investigation, there is no circumvention of the constitutionally mandated policy of adversary

criminal proceedings. *Garner v. United States*, 424 U.S. 648, 656 (1976).

A psychiatric examination has been held to be not inherently coercive in the same sense as an involuntary confession. *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976). Generally, the context in which a Fifth Amendment privilege has been asserted as to a psychiatric examination is in proof of sanity at the time of the offense or competency to stand trial. In the case of sanity, the proof of the essential element of *mens rea* is at issue. The purpose and objective of a mental examination is not to obtain facts concerning a defendant's participation in the criminal act, but to obtain facts concerning a defendant's character. *United States v. Cohen, supra; United States v. Albright*, 388 F.2d 719 (7th Cir. 1968). Although it has been suggested that *Miranda* warnings are applicable to statements bearing on "intent," *Thornton v. Corcoran*, 407 F.2d 695, 700 (D.C.Cir. 1969), proof of "intent" in the case at bar had already been established.

The theory that the psychiatric examination is a gathering of "real or phsycial evidence" upon which an expert opinion is based is more plausible. In *United States v. Baird*, 414 F.2d 700, 709 (2nd Cir. 1969), it was held:

> The statements which the defendant makes to the psychiatrist may be as vital for diagnosis as an X-ray or blood test may be to a physician in another context...therefore even though they are verbal, they may be considered as 'real or physical evidence' rather than communications' or 'testimony' within the meaning of *Schmerber v. California*, 384 U.S.757 (1966).

The psychiatric evaluation is based on physiological responses as well as verbal responses. As in cases where blood is analyzed, or the quality of a voice is assessed, the underlying communications, both verbal and

nonverbal, are used as a basis upon which the psychiatrist formulates his opinion. *See, Schmerber v. California*, 484 U.S.757 (1966); *United States v. Wade*, 488 U.S. 218 (1967); *United States v. Dionisio*, 410 U.S. 1 (1973). The evidence is not "used for the testimonial or communicative content of what was to be said." *United States v. Dionisio, supra*, at 7.

The psychiatric examination was not performed by an agent of law enforcement, nor was the purpose of the examination to seek evidence of guilt. Therefore, *Miranda v. Arizona*, does not apply.

C. The Fifth Amendment Privilege Against Self-Incrimination is not Self-Executing.

The privilege against self-incrimination must be invoked in a timely manner. *Roberts v. United States, supra*, at 4372, *citing Garner v. United States*, 424 U.S. 648, 653-55 (1976); *United States v. Kordel*, 397 U.S. 1, 7-10 (1970); *United States v. Mandujano*, 425 U.S. 564, 574-75 (1976)(opinion of Burger, C.J.); *id.*, at 591-94 (Brennan, J., concurring in the judgment).

As in *Roberts*, the Respondent should have asserted his Fifth Amendment claim at the time of the sentencing trial. Instead, he made no assertion of his privilege at any time during these proceedings. Respondent had affirmatively waived his rights at the time he gave the confession to law enforcement officials. He again waived his privilege against self-incrimination at the time he testified in his own behalf.

Texas requires that the privilege be asserted or it is considered waived. *Crestfield v. State*, 471 S.W.2d 50 (Tex.Crim.App. 1971), *cert. denied* 406 U.S. 917 (1972). An objection on the precise claim asserted must be made at the time the testimony is offered. *Boulware v. State*, 542 S.W.2d 677 (1976) *cert. denied*, 430 U.S. 959 (1977); *Crestfield v. State, supra*. A failure to timely object to the

voluntariness of a statement waives the error, if any. *Gibson v. State*, 516 S.W.2d 406 (Tex.Crim.App. 1974); *Shumake v. State*, 502 S.W.2d 758 (Tex.Crim.App. 1973); *Taylor v. State*, 489 S.W.2d 890 (Tex.Crim.App. 1973); *Harris v. State*, 465 S.W.2d 175 (Tex.Crim.App. 1971).

Respondent was required to assert his privilege at the time which he perceived his rights were violated. Rather, Respondent did not raise this claim of self-incrimination until he filed an application for writ of habeas corpus, three years after the testimony was admitted.

Absent an assertion of the privilege at the time of the communications, *Roberts v. United States, supra*, and a correct contemporaneous objection at trial, *Wainwright v. Sykes*, 433 U.S. 72 (1977), the privilege is waived and any trial error accompanying introduction of testimony relating to the communications is not preserved, Tex. Code Crim. Proc. Ann. art. 1.14 (Vernon).

III. THE FEDERAL DISTRICT COURT ERRED IN GRANTING THE WRIT OF HABEAS CORPUS WITHOUT REQUIRING PROOF FROM THE HABEAS PETITIONER.

28 U.S.C. §2254, requires that the petitioner for habeas corpus relief in federal court prove his wrongful restraint. The lower federal courts are in a position to provide a full and complete record upon which a meaningful accommodation between state criminal law enforcement and a state prisoner's constitutional rights may be based. *Fay v. Noia*, 372 U.S. 391 (1963). The mandate of Congress in designing the Rules Governing Federal Habeas Corpus Procedures was to afford a trial-type proceeding in federal court for state prisoners aggrieved by unconstitutional detention. *Townsend v. Sain*, 372 U.S. 293 (1973). The history of the writ is not a creation providing appellate review, but rather is the

power of inquiry which is plenary. 372 U.S. at 311-12. In this case, no hearing was ever conducted as to the due process claims or as to any Fifth Amendment privilege claims. There must be an opportunity for both the state prisoner and the State itself to be heard, to argue and present evidence, and to confront and cross-examine witnesses.

The affidavit filed by the state trial court judge set forth the belief by the judge that defense counsel were aware of the examination of Respondent Smith. This contradicted the statement in the affidavits of defense counsel when they stated they were never aware of such appointment. During the course of a fact finding hearing, counsel for the State would have had the opportunity to cross-examine counsel for Smith as to their knowledge of the examination. They could have been asked whether the Respondent himself ever told them that he had been examined by the psychiatrist and their purpose in requesting records of Dr. Grigson's visit. Moreover, cross-examination could have explored counsel's familiarity with psychiatric examination and evidence, as well as their specific experience in presenting direct testimony from Dr. Grigson and cross-examining Dr. Grigson in previous trials. A fact finding hearing could also encompass the exact nature of the statements made to Dr. Grigson by Respondent Smith. Since a hearing was not conducted, there was no opportunity to fully develop these aspects of the record.

The power of a federal district court to conduct a hearing must not be used to "subvert the integrity of the criminal justice system." *Townsend v. Sain*, 372 U.S. 293, 318 (1963). If, as a matter of law, this Court finds a due process right beyond that afforded to Respondent on the face of the record or a Fifth Amendment privilege as to a psychiatric examination, then this cause should be remanded to the federal district court for full development of the underlying factual basis of those claims. Without such opportunity for a hearing, to present evidence and cross-examine witnesses, the basic

interest of comity between state and federal courts is subverted. The integrity of the state judicial system should not be overriden nor cast aside on the basis of an incomplete factual determination.

CONCLUSION

For these reasons, the Petitioner respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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